# TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

**v.**

# ONG BENG CHUAN

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
ALAUDDIN MOHD SHERIFF FCJ
AUGUSTINE PAUL FCJ
[CRIMINAL APPEAL NO: 05-19-2006 (J)]
22 SEPTEMBER 2006

***PREVENTIVE DETENTION:*** *Detention order - Application for habeas corpus - Reliance by detainee on r. 3 Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 - Whether officer who carried out duties under r. 3(2), (3) and (4) Officer in Charge as specified in said rules - Whether officer lawfully exercising functions of that office - Whether there was breach of requirements of r. 3(2), (3) and (4) - Whether breach invalidates act of detention - Whether breach subject to judicial review*

***CRIMINAL PROCEDURE:*** *Habeas corpus - Preventive detention - Reliance by detainee on r. 3 Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 - Whether officer who carried out duties under r. 3(2), (3) and (4) Officer in Charge as specified in said rules - Whether officer lawfully exercising functions of that office - Whether there was breach of requirements of r. 3(2), (3) and (4) - Whether breach invalidates act of detention - Whether breach subject to judicial review*

In this appeal, the detainee was detained for a period of two years with effect from 18 December 2004 pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act'). He filed a writ of *habeas corpus* in the High Court seeking his release and at the hearing of the writ, based his argument on only one point in reliance on r. 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. In this case, the officer who carried out the duties under r. 3(2), (3) and (4) was one Sazali Ismail, a Superintendent at Pusat Pemulihan Akhlak, Muar, Johor. The detainee contended in the High Court that there was no evidence on record to show that Sazali Ismail was the Officer in Charge ('OIC') as specified in the

said rules. The learned Deputy Public Prosecutor, in his reply, said that it could be assumed that he was the OIC. The detainee was accordingly released, resulting in the present appeal. The issue requiring determination was the effect of an act done by a person when he is not the holder of the office who is required by law to do the act in question.

**Held (allowing the appeal)**
**Per Augustine Paul FCJ:**

**(1)** Sazali Ismail had only described himself as a Superintendent of the place of detention, and such a description was certainly insufficient to show that he was the OIC. The fact that the duty to carry out the functions in the rules is entrusted to the OIC is no doubt of importance, the purpose being to ensure that they are carried out properly. However, there is no qualification in r. 3(2), (3) and (4) requiring the OIC to carry out the duties personally. The rules, as they stand, read with s. 7 of the Interpretation Acts 1948 and 1967 mean that the functions of the OIC can also be carried out by someone who is lawfully exercising the functions of that office. It follows that a reference to the OIC in r. 3(2), (3) and (4) includes a person who is lawfully exercising the functions of that office. Needless to say, where the functions are carried out by someone else, he must tender in evidence his right to act in that capacity. A failure to do so will no doubt lead to a breach of the requirements of r. 3(2), (3) and (4). In this case, there was no evidence to show that Sazali Ismail was the person lawfully holding, acting in or exercising the functions of the OIC. Therefore, there was a breach of r. 3(2), (3) and (4) to that extent. (para 5)

**(2)** In *District Board Kheri v. Abdul Majid Khan*, it was held that where the prescription of an Act relates to the performance of a duty by a public officer, the breach of such prescription when it does not cause any real injustice does not invalidate the act done under the Act and, therefore, such prescriptions are merely directory. This was particularly so in this case as there was no requirement that the communication must be made by the OIC personally. After all, s. 9(2) of the Act only provides that for the purpose of enabling a person to make representation, he shall be informed of that right. It does not say that communication must be made by any specified officer.

It follows that the fact that the requirements of r. 3(2), (3) and (4) were performed by a person who is not the OIC does not invalidate the act done. Thus the fact that the duties specified in r. 3(2), (3) and (4) had not been carried out by the OIC, although a breach, did not affect the hearing before the Advisory Board and, consequently, was not one that would govern the exercise of discretion by the Yang di-Pertuan Agong in making a decision on the recommendation of the Advisory Board. It was, therefore, not one that was subject to judicial review within the meaning of s. 11C of the Act. (para 8)

***Bahasa Malaysia*** *translation of headnotes*

Orang tahanan di dalam rayuan ini telah ditahan untuk tempoh dua tahun bermula 18 Disember 2004 di bawah s. 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta'). Beliau memfail writ *habeas corpus* di Mahkamah Tinggi memohon pembebasannya, dan di pendengaran writ, telah bergantung hanya kepada satu hujah berlandaskan k. 3, Kaedah-kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987. Fakta menunjukkan bahawa pegawai yang menjalankan tugas di bawah k. 3(2), (3) dan (4) di sini adalah Sazali Ismail, seorang Superintendent di Pusat Pemulihan Akhlak, Muar, Johor. Di Mahkamah Tinggi, orang tahanan berhujah bahawa tidak terdapat keterangan pada rekod yang menunjukkan bahawa Sazali Ismail adalah Pegawai Yang Menjaga ('OIC') sepertimana yang diperuntukkan di dalam kaedah-kaedah. Dalam jawapannya, yang arif Timbalan Pendakwa Raya berkata bahawa adalah boleh diandaikan bahawa Sazali Ismail adalah OIC pusat pemulihan berkenaan. Orang tahanan kemudian telah dibebaskan sekaligus mengakibatkan rayuan di sini. Isu yang perlu diputuskan adalah menyangkuti kesan tindakan yang diambil oleh seseorang dalam keadaan di mana beliau bukanlah pemegang jawatan yang dikehendaki oleh undang-undang untuk melaksanakan tindakan tersebut.

**Diputuskan (membenarkan rayuan)**
**Oleh Augustine Paul HMP:**

**(1)** Sazali Ismail hanya memperihalkan dirinya sebagai seorang Superintendent di pusat tahanan tersebut, dan pemerihalan sebegitu tentunya tidak mencukupi untuk menunjukkan bahawa beliau adalah OIC. Fakta bahawa kaedah-kaedah meletakkan

tugas untuk menjalankan fungsi ke atas OIC adalah penting, kerana ia bertujuan supaya ianya dilaksanakan dengan teratur. Walau bagaimanapun, tidak terdapat apa-apa syarat di k. 3(2), (3) dan (4) yang mengkehendaki supaya OIC melaksanakan tugas tersebut secara peribadi. Kaedah-kaedah, sebagaimana ianya wujud, dibaca bersama s. 7 Akta-Akta Tafsiran 1948 dan 1967, memberi makna bahawa fungsi-fungsi OIC boleh dilaksanakan oleh seseorang yang menjalankan tugas-tugas jawatan tersebut secara sah. Ianya mengikut bahawa rujukan kepada OIC di k. 3(2), (3) dan (4) merangkumi seseorang yang melaksanakan secara sah fungsi-fungsi jawatan itu. Justeru, di mana fungsi-fungsi dilaksanakan oleh seorang yang lain, beliau hendaklah menunjukkan keterangan mengenai haknya untuk bertindak dalam kapasiti tersebut. Kegagalan berbuat demikian, tanpa ragu lagi, adalah melanggar kehendak k. 3(2), (3) dan (4). Dalam kes semasa, tidak terdapat keterangan yang menunjukkan bahawa Sazali Ismail adalah orang yang secara sah memegang jawatan OIC, atau bertindak bagi OIC atau yang melaksanakan fungsi-fungsi OIC. Oleh itu, berlaku pelanggaran k. 3(2), (3) dan (4) dengan sekadarnya.

**(2)** Di dalam *District Board Kheri v. Abdul Majid Khan*, ianya diputuskan bahawa, di mana preskripsi Akta menyentuhi pelaksanaan tugas oleh seorang pegawai awam, pelanggaran preskripsi tersebut, di mana ianya tidak menyebabkan ketidakadilan yang ketara, tidak membatalkan tindakan yang dibuat di bawah Akta, dan kerana itu, preskripsi sedemikian hanyalah bersifat direktori. Lebih-lebih lagi seperti dalam kes di sini, di mana tidak wujud keperluan bahawa komunikasi harus dibuat oleh OIC secara peribadi. Apapun, s. 9(2) Akta hanya memperuntukkan bahawa, bagi maksud seseorang membuat representasi, dia hendaklah diberitahu akan hak itu. Ia tidak mengatakan bahawa komunikasi hendaklah dibuat oleh seseorang pegawai tertentu. Ianya mengikut bahawa, fakta bahawa kehendak k. 3(2), (3) dan (4) telah dilaksanakan oleh seorang yang bukan OIC tidaklah membatalkan tindakan yang diambil. Maka itu, fakta bahawa tugas-tugas seperti yang digariskan oleh k. 3(2), (3) dan (4) tidak dijalankan oleh OIC, walaupun merupakan suatu pelanggaran, tidak memberi kesan kepada pendengaran di hadapan Lembaga Penasihat, dan dengan itu, tidak mengawal pelaksanaan budibicara oleh Yang

di-Pertuan Agong untuk membuat keputusan atas syor Lembaga Penasihat. Dengan itu, ia bukanlah sesuatu yang tertakluk kepada semakan kehakiman seperti yang di maksudkan s. 11C Akta.

**Case(s) referred to:**

*Abdul Ghani Jusoh & Anor v. PP [1981] 1 MLJ 25* ***(refd)***

*District Board Kheri v. Abdul Majid Khan AIR [1930] Oudh 434* ***(foll)***

*Howard v. Bodington [1876] 2 PD 203* ***(refd)***

*Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC* ***(foll)***

*Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 HC* ***(refd)***

*Wong Kiew Meow v. Timbalan Menteri Dalam Negeri Malaysia [1994] 2 CLJ 43 HC* ***(refd)***

**Legislation referred to:**

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 9(2), 11C

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 3(2), (3), (4)

Interpretation Acts 1948 and 1967, s. 7

*For the appellants - Tengku Amir Zaki Tengku Hj Abdul Rahman (Najib Zakaria with him)*

*For the respondent - RR Mahendran (Gobind Singh Deo with him); M/s RR Mahendran & Co*

*[Appeal from High Court, Muar; Criminal Application No: 44-32-2005]*

*Reported by Suresh Nathan*

## JUDGMENT

**Augustine Paul FCJ:**

**[1]** This appeal was heard together with Federal Court Criminal Appeals No 05-18-2006 (J) and 05-21-2006 (J) as they involved a common question of law. The issue for determination is the effect of an act done by a person when he is not the holder of the office who is required by law to do the act in question.

**[2]** The detainee was detained for a period of two years with effect from 18 December 2004 pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("the Act"). He filed a writ of *habeas corpus* in the High Court seeking

his release. At the hearing of the writ learned counsel based his argument on only one point in reliance on r. 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 which reads as follows:

> 3(1) When any person is served with a detention order, the police officer serving the detention order shall at the same time:
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> (a) inform that person of his right to make representations against the detention order; and
>
> (b) provide him with three copies of Form I prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.
>
> (2) A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I duly signed by him to the Secretary through the Officer in Charge of the Police District where the detention order was served or the Officer in Charge of the place of detention.
>
> (3) When a detained person is brought to a place of detention, the Officer in Charge shall as soon as practicable remind the person of his right to make representations.
>
> (4) The Officer in Charge of the Police District where the detention order was served or the Officer in Charge, as the case may be, who receives any written representation in Form I shall forthwith forward such representation to the Secretary.
>
> (5) Where a detained person refuses to accept service of any document to be served on him under the Act or these rules, the Officer in Charge of the Police District where the detention order is served shall forthwith inform the Secretary of such refusal and it shall be presumed that the detained person is not making any representation against his order of detention.
>
> (6) A detained person who refuses to accept service of any document at the time when he was served with the detention order may request the Officer in Charge to serve Form I on him, and the Officer in Charge shall on such request being made, serve three copies of Form I on the detained person and inform the Secretary of such service.

**[3]** In this case the officer who carried out the duties under r. 3(2), (3) and (4) was one Sazali bin Ismail. He was a Superintendent at Pusat Pemulihan Akhlak, Muar, Johor. Learned counsel contended in the High Court that there was no evidence on record to show that Sazali bin Ismail was the Officer in Charge as specified in the said rules. In his reply the learned Deputy Public Prosecutor said that it can be assumed that he was the officer in charge. In support of his contention he referred to *Wong Kiew Meow v. Timbalan Menteri Dalam Negeri Malaysia* [1994] 2 CLJ 43. In upholding the objection raised the learned Judge of the High Court said in his grounds of judgment:

> It might not be that obvious, but Rule 3 requires specific officers to carry out specific tasks. The officer to inform the person of his right to make representations against the detention order and to provide that person with 3 copies of Form I (see *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28) and obtain an acknowledgement of the receipt thereof, is the police officer serving the detention order (sub-rule 3(1)). When a detained person is brought to a place of detention, the officer to remind that person of his right to make representations is the Officer in Charge of the place of detention. A detained person who desires to make any representation shall complete Form I and shall forward two copies of the completed Form I to the Secretary of the Advisory Board through the Officer in Charge of the Police District where the detention order was served or the Officer in Charge of the place of detention. The officer to forward the representation is the Officer in Charge of the Police District where the detention order was served or the Officer in Charge of the place of detention.
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> But alas, there is no evidence for (sic) to find that it was the Officer in Charge of the place of detention who had carried out the designated task. The officer who reminded Balamurugan a/l Gopalan of his right under rule 3(2) and who forwarded the representation to the Advisory Board was one Delber Singh a/l Sadhu Singh who affirmed (see enclosure 16 – 44-30-05) that he was a Senior Deputy Superintendent at the place of detention (Batu Gajah). The officer who reminded Ong Beng Chuan of his right under rule 3(2) and who forwarded the representation to the Advisory Board was one Sazali bin Ismail Azman who affirmed (see enclosure 15 – 44-32-05) that he was a Superintendent at the place of detention (Muar). The officer who reminded Chai Wi Su of his right under rule 3(2) and who forwarded the representation to the Advisory Board was one Azman bin Mohd Ali who affirmed (see enclosure 18 – 44-33-05) that he was a

Senior Superintendent at the place of detention (Muar). And the officer who reminded Eng Chee Keong of his right under rule 3(2) and who forwarded the representation to the Advisory Board was one Azman bin Mohd Ali who affirmed (see enclosure 17 – 44-37-05) that he was a Deputy Superintendent at the place of detention (Muar).

The court was invited to assume that the aforesaid officers were indeed the Officers in Charge of the places of detention. In Wong Kiew Meow, Abdul Aziz bin Mohamed J, accepted that the officer concerned (Noorbahri) must be the Officer in Charge of the place of detention, as it was explained by Noorbahri that he was the director and as well as the highest ranking officer at the place of detention. But there is no such or other material in the present cases for to assume or to infer that any of the officers concerned was the Officer in Charge of the place of detention. What is in evidence is the rank of the officers concerned, which only reveals the position of grade of those officers in the uniform service but not their position of responsibility at the place of detention. In short, there is no evidence that it was the Officer in Charge of the place of detention, although that was mandated by law, who reminded the Applicants of their rights under rule 3(2) and who forwarded the representation of the Applicants to the Advisory Board. In the absence of that evidence, it would not be reasonable to hold that the Respondents had complied with all procedural requirements. Rather, it must be held that there was a failure in procedure which warrants the Applicants to be set free.

The detainee was accordingly released. The learned judge had erred in law in proceeding on the basis that the failure to establish that Sazali bin Ismail, who carried out the functions under r. 3(2), (3) and (4), was the officer in charge is fatal without a consideration of the nature and effect of the breach. This appeal is by the respondents.

**[4]** At the hearing of the appeal before us the learned Deputy Public Prosecutor argued that the mandatory requirements of r. 3(2), (3) and (4) have been complied with. The detainee had been informed of his right to make representations and that the written representation in Form I had been forwarded to the Advisory Board. He then referred to the case of *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 and said that the requirement for these functions to be carried out by the officer in charge is only directory and non-compliance with it is not fatal. In his reply

learned counsel referred to the case of *Abdul Ghani bin Jusoh & Anor v. PP* [1981] 1 MLJ 25 and said that where a duty is prescribed to be performed by a named officer then it should be carried out only by him. As such, he said, a breach of that requirement is fatal without the need to show prejudice.

**[5]** The objection taken by learned counsel in the High Court and before us is that there is no evidence to show that Sazali bin Ismail who carried out the duties specified in r. 3(2), (3) and (4) was the officer in charge of Pusat Pemulihan Akhlak, Muar, Johor as he had only described himself as a Superintendent of that place. Such a description is certainly insufficient to show that he was the officer in charge. The fact that the duty to carry out the functions in the rules is entrusted to the officer in charge is no doubt of importance. The purpose is to ensure that they are carried out properly and promptly. However, there is no qualification in r. 3(2), (3) and (4) requiring the officer in charge to carry out the duties personally. This brings into focus s. 7 of the Interpretation Act 1967 ("s. 7") which reads as follows:

> A reference to the holder of any public or other office (including a reference in an appointment made pursuant to section 50) is a reference to the person for the time being lawfully holding, acting in or exercising the functions of that office.

Thus the rules, as they stand, read with s. 7 mean that the functions of the officer in charge can also be carried out by someone who is lawfully exercising the functions of that office. It follows that a reference to the officer in charge in r. 3(2), (3) and (4) includes a person who is lawfully exercising the functions of that office. Needless to say, where the functions are carried out by someone else he must tender in evidence his right to act in that capacity. A failure to do so will no doubt lead to a breach of the requirements of r. 3(2), (3) and (4). In this case there is no evidence to show that Sazali bin Ismail was the person lawfully holding, acting in or exercising the functions of the officer in charge. There is therefore a breach of r. 3(2), (3) and (4) to that extent.

**[6]** The resultant matter for consideration is whether the breach is subject to judicial review. A right to judicial review when there is a breach of a procedural requirement in the making of a

detention order under the Act was considered by this court in *Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 FC in the following words:

> The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 28; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements by section 11C(1) of the Act which reads as follows:
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> > There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

**[7]** It must be observed that the significant parts of r. 3(2), (3) and (4) are a reminder to the detainee of the right to make representation and the receipt and forwarding of Form I to the Secretary of the Advisory Board. Non-compliance with these aspects of the rules will affect the right of representation of the detainee. Thus any breach in the matters to be communicated to the detainee will affect the hearing before the advisory board. This will in turn have a direct bearing on the recommendation to be made to the Yang di-Pertuan Agong by the advisory board. Thus it can only mean that the more crucial aspect of r. 3(2), (3) and (4) is the performance of the duties required by the rules. That, however, cannot be said of the person who is required to communicate the information to the detainee. The fact that it has been done by a person who is not the officer in charge will have no bearing on the conduct of the hearing by the advisory board. In this regard reference may be made to *Howard v. Bodington* [1876] 2 PD 203 where Lord Penzance said at p 211:

> There may be many provisions in Acts of Parliament which although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end.

In *District Board Kheri v. Abdul Majid Khan* AIR [1930] Oudh 434 it was held that where the prescription of an Act relates to the performance of a duty by a public officer the breach of such prescription when it does not cause any real injustice does not invalidate the act done under the Act and therefore such prescriptions are merely directory. This is particularly so in this case as there is no requirement that the communication must be made by the officer in charge personally. After all s. 9(2) of the Act only provides that for the purpose of enabling a person to make representation he shall be informed of that right. It does not say that the communication must be made by any specified officer. It follows that the fact that the requirements of r. 3(2), (3) and (4) were performed by a person who is not the officer in charge does not invalidate the act done.

**[8]** Thus the fact that the duties specified in r. 3(2), (3) and (4) have not been carried out by the officer in charge, though a breach, does not affect the hearing before the advisory board and, consequently, is not one that will govern the exercise of discretion by the Yang di-Pertuan Agong in making a decision on the recommendation of the advisory board. It is therefore not one that is subject to judicial review within the meaning of s. 11C of the Act.

**[9]** Accordingly, we allow the appeal.